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Realigning Parties

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REALIGNING PARTIES

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Abstract

The doctrine of realignment—which permits a federal court to change a party's litigating position from plaintiff to defendant or vice versa—has been virtually ignored in federal procedure scholarship. This stark neglect is genuinely astonishing because the federal circuit courts are split as to the appropriate standard. The source of the standard—and the circuit courts' confusion—is a 1941 U.S. Supreme Court decision, City of Indianapolis v. Chase National Bank. *In that decision, rather than focusing on realignment's purpose, the Supreme Court focused unduly on the specific context in which the realignment issue arose. The result was a muddled articulation of the appropriate standard.*

Realignment's purpose lies in assuring the necessary adversarial context mandated by Article III's references to "cases" and "controversies"—but City of Indianapolis *makes no mention of the case-or-controversy requirement in either the majority or dissenting opinions. Instead, the Court erroneously and confusingly defined its analysis within the specific diversity-jurisdiction context in which the realignment issue arose. This analytical error resulted in a perplexing and misguided standard and contributed to the common misperception that the doctrine of realignment is only applicable to diversity cases.*

Had the City of Indianapolis *Court properly analyzed the realignment doctrine according to its purpose, its analysis would have mirrored that in declaratory judgment cases. An identical concern underlies both the doctrine of realignment and declaratory judgment actions—i.e., ensuring the existence of a case or controversy—and therefore the same standard should apply in the realignment context: whether there is a substantial controversy between parties having adverse legal interests.*

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INTRODUCTION

In federal court, one is not always confined to the hand she is dealt. In light of the axiom that the plaintiff is the master of her claim,[1] and in light of the reality that the plaintiff drafts the complaint and thereby designates the plaintiffs and defendants, we tend to assume that the plaintiff's configuration of who is suing whom is accurate. Less known is a federal concept of long historical standing, the doctrine of realignment,[2] which authorizes federal courts to change a plaintiff to a defendant, or vice versa. The federal courts do not often invoke this doctrine; the case law analyzing the topic is sparse,[3] and scholarly treatment borders on nonexistent.[4] This lack of attention to the doctrine of realignment is surprising due to realignment's pedigree, which ordinarily would tend to generate extensive legal commentary. Realignment is a constitutionally grounded procedure and was validated in a U.S. Supreme Court decision authored by Justice Frankfurter[5]—a decision that has resulted in a circuit-court split in attempting to identify the appropriate test.[6]

The source of the circuit courts' confusion is a 1941 Supreme Court decision, *City of Indianapolis v. Chase National Bank*.[7] In that case, the Supreme Court focused unduly on the specific context in which the realignment issue arose, rather than focusing on realignment's purpose, resulting in a muddled articulation of the appropriate standard.

Realignment's purpose lies in assuring the necessary adversarial context mandated by Article III's references to "cases" and "controversies"—but *City of*

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[1] Despite the lack of scholarly commentary, it is well accepted that, among the choices available under the law, plaintiffs have the initial choice of the judicial system (federal or state, depending on the limits of subject-matter jurisdiction); the parties who will join as plaintiffs; the parties to be named as defendants (assuming personal jurisdiction is available for court process to reach them); and the place of trial (venue). The Supreme Court has acknowledged this plaintiffs-choice system. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241–42 (1981); Hoffman v. Blaski, 363 U.S. 335, 344 (1960). In addition, plaintiffs are able to take advantage of any jurisdiction in which the action can be brought and where the statute of limitations against the plaintiff's claim has not run, even if only one such state remains. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778–80 (1984).

[2] As a general matter, to "realign" means "to readjust alliances or working arrangements between or within." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1193 (4th ed. 2008). Similarly, the doctrine of realignment authorizes the federal courts to change a lawsuit's configuration such that a party plaintiff becomes a party defendant or vice versa.

[3] *See infra* note 20 (noting that the number of federal cases addressing the realignment doctrine averages only approximately five per year).

[4] *See infra* note 8 (citing the three law-review articles and two case notes that have addressed the doctrine of realignment).

[5] City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69–70 (1941).

[6] *See infra* note 46 (discussing the split in the circuit approaches to realignment).

[7] 314 U.S. 63 (1941).

Indianapolis makes no mention of the case-or-controversy requirement in either the majority or dissenting opinions. Instead, the Court erroneously and confusingly defined its analysis within the diversity-jurisdiction context in which the realignment issue arose. This analytical error resulted in a perplexing and misguided standard and contributed to the common misperception that the doctrine of realignment is only applicable to diversity cases.

Had the *City of Indianapolis* Court properly analyzed the realignment doctrine according to its purpose, the analysis would have mirrored that in declaratory judgment cases. An identical concern underlies both the doctrine of realignment and declaratory judgment actions—ensuring the adversity necessary to satisfy the Article III case-or-controversy requirement—and therefore the same standard should apply in both contexts: whether there is a substantial controversy between parties having adverse legal interests.

This Article analyzes the neglected federal doctrine of realignment. Part I demonstrates that realignment is not restricted to diversity cases; it also applies in cases based on arising-under jurisdiction. Part II examines the Supreme Court's treatment of realignment in its seminal *City of Indianapolis* decision. Part III analyzes the flaws in the reasoning of that decision and reestablishes the doctrinal foundation of the doctrine. Part IV analyzes realignment's ultimate purpose and underpinnings, which lie in the Constitution's case-or-controversy requirement. Finally, Part V proposes that in evaluating whether realignment is appropriate, federal courts should use the same standard employed in declaratory judgment actions, thus finding realignment improper when the facts reflect a substantial controversy between parties having adverse legal interests.

I. THE SIGNIFICANCE OF THE DOCTRINE OF REALIGNMENT

There would be little sense in writing about the doctrine of realignment if every analytical angle had already been thoroughly explored by others. The relative lack of attention given to this doctrine by the legal academy, however, makes our task a bit different. Accordingly, we begin by explaining how this Article differs from the existing commentary, and why—contrary to a recent call for its abolition—the doctrine of realignment serves an important, constitutionally based purpose.

It appears that every law review article analyzing the doctrine of realignment has focused on that doctrine's relationship to a procedural concept unique to the federal courts: diversity jurisdiction.[8] Certainly realigning the parties to a lawsuit

[8] *See, e.g.*, William A. Braverman, *Janus Was Not A God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1077–1100 (1993) (discussing at length the Founders' rationales for diversity jurisdiction, the modern debate over diversity, diversity's impact on the federal courts, Congress's treatment of diversity, and Justice Frankfurter's personal dislike of diversity jurisdiction); April N. Everette, United States Fidelity and Guaranty Co. v. A&S Manufacturing Co.*: Realignment of Parties in Diversity Jurisdiction Cases*, 74 N.C. L. REV. 1979, 1984 (1996) (describing the doctrine

has the potential to destroy complete diversity of citizenship, thus depriving the federal court of the subject-matter jurisdiction required to hear the case when no federal question exists. Although the doctrine of realignment can thus play a crucial role in whether the court can exercise diversity jurisdiction, it is a mistake to characterize realignment as serving exclusively that role.

Despite the legal commentary's pointed focus on realignment in the context of diversity jurisdiction, the federal courts have expressly, and repeatedly, held that realignment is not limited to diversity cases. "Although realignment questions typically arise in the diversity of citizenship context, the need to realign a party whose interests are not adverse to those of his opponent(s) exists regardless of the basis for federal jurisdiction."[9] In *Wade v. Mississippi Cooperative Extension Service*,[10] for example, the plaintiffs sued the Mississippi Cooperative Extension Service and various state and federal governmental entities for discrimination under federal-question jurisdiction.[11] When the U.S. Justice Department subsequently intervened as a plaintiff, a question arose as to whether the federal

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of realignment as "necessarily intertwined with diversity jurisdiction"); Jacob S. Sherkow, *A Call for the End of the Doctrine of Realignment*, 107 MICH. L. REV. 525, 529–31, 541–45, 553–59 (2008) (discussing the history of diversity jurisdiction, characterizing realignment as a question of jurisdiction, and ultimately positing that realignment is unnecessary because the improper joinder statute can be used to thwart any improper invocation of diversity jurisdiction). Two other articles are case notes and thus merely discuss the results in a single court decision, although both are again in the diversity context. *See generally* Moulton A. Goodrum, Jr., *Federal Jurisdiction—Corporations—Realignment of Corporation as Affecting Diversity Jurisdiction in a Stockholder's Derivative Suit*—Smith v. Sperling, 354 U.S. 91 (1957), 36 TEX. L. REV. 238 (1957); Recent Cases, *Federal Courts—Diversity of Citizenship—Realignment of Parties in Determining Jurisdiction*, 40 HARV. L. REV. 1015 (1927) (discussing Franz v. Buder, 11 F.2d 854 (8th Cir. 1926)); *see also* 15 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE §§ 102.20, 102.21[6], 63–64, 86 (3d ed. 2013) (discussing realignment only in the diversity context); 16 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE §§ 107.14[2][c][vi], 101 (3d ed. 2013) (same); 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3607, 303–40 (3d ed. 2009) (same).

[9] Larios v. Perdue, 306 F. Supp. 2d 1190, 1195 (N.D. Ga. 2003); *see also id.* at 1197 ("[T]he need to assess the alignment of parties is equally strong in federal question cases like this one as it is in those premised on diversity jurisdiction."); Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc., 54 F.3d 156, 159 (3d Cir. 1995) ("[W]e must consider [realignment of parties] a fundamental principle of federal jurisdiction, a principle associated with, but not limited to, diversity jurisprudence."); *In re* Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230, 1242 (3d Cir. 1994) (noting that the district court had "erroneously reasoned that realignment was a principle associated exclusively with diversity jurisdiction"); Seminole Cnty. v. Pinter Enters., Inc., 184 F. Supp. 2d 1203, 1209 (M.D. Fla. 2000) ("Realignment does not only apply to diversity cases.").

[10] 528 F.2d 508 (5th Cir. 1976).

[11] *See id.* at 510.

court should realign the other federal defendants as plaintiffs.[12] Noting the applicability of the doctrine of realignment in federal-question cases,[13] the Fifth Circuit observed:

> [I]t is difficult to see how the interests of one department of the government, which had implicitly or explicitly given support and sanction to the various policies of [the Mississippi Cooperative Extension Service] over the years, could be identical with the interests of another department of the government, which was asserting that those very policies were discriminatory and in violation of the law.[14]

Recognizing that the doctrine of realignment applies to federal cases generally, rather than solely to diversity cases, frees it to perform its essential constitutional function of ensuring there is an actual case or controversy. This recognition also renders largely irrelevant the focus on diversity-based issues in the existing realignment scholarship, such as the Founders' rationales for diversity[15] and whether diversity's rationales are enduring.[16] This recognition similarly renders irrelevant the focus on diversity-based proposals in the existing realignment scholarship. For example, 28 U.S.C. § 1359, which addresses collusive or improper joinder in diversity cases,[17] does not serve as a basis for abolishing the doctrine of realignment[18] because it is inapplicable to party alignment in cases not based exclusively on diversity. Other justifications for abolishing the doctrine of realignment by using concepts of fraudulent joinder and expanding the concept of a "direct action" against insurers[19] also become irrelevant with the recognition that realignment is not restricted to the diversity context.

Realignment's ultimate purpose is to ensure that parties are on the proper side of the litigation. Motions to realign the parties are relatively few in number,[20]

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[12] *Id.* at 521.

[13] *Id.* ("Although the correctness of a realignment of parties is an issue that normally arises only in the context of diversity jurisdiction cases, the principles applicable to those cases are equally so here [where federal jurisdiction is predicated on the existence of a federal question].").

[14] *Id.* at 521.

[15] Braverman, *supra* note 8, at 1078–83.

[16] *Id.* at 1082–86.

[17] Section 1359 provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (2006).

[18] Jacob Sherkow has offered this argument, see Sherkow, *supra* note 8, at 553–56, 558–59.

[19] Jacob Sherkow has offered these diversity-based arguments, see Sherkow, *supra* note 8, at 558–59.

[20] A Westlaw search of all published federal decisions from January 1, 2004, to January 1, 2014, using the Allfeds database and the search terms "'Indianapolis v. Chase' &

suggesting that the doctrine is neither creating extensive jurisdictional abuses nor burdening the federal courts. Moreover, realignment serves an important constitutional purpose in ensuring the adversity necessary to the constitutional case-or-controversy requirement. Even if the need arises only in a relatively small number of cases, the approach employed to determine whether realignment is appropriate in a given instance is critical to the doctrine's proper implementation.

Before we turn to our approach, however, it is worth looking at the Supreme Court case that created the mistaken view that realignment's value is limited to the diversity context. Thus, we now turn to the Supreme Court decision from which current realignment tests are drawn.

II. REALIGNMENT AND THE SUPREME COURT

The history of the doctrine of realignment is long in time but relatively short in discussion. Its foundation was set in the Supreme Court's 1941 decision, *City of Indianapolis v. Chase National Bank*.[21]

City of Indianapolis did not create the doctrine of realignment; indeed, *City of Indianapolis* cites to earlier realignment decisions of both the Supreme Court and lower federal courts.[22] However, *City of Indianapolis*'s focus on, and analysis of, the doctrine of realignment constitutes the Court's greatest guidance on this subject. Unfortunately, by focusing on different portions of the *City of Indianapolis* majority opinion, the circuit courts are divided as to whether to analyze realignment pursuant to the "substantial controversy" test or the "principal purpose" test.

In *City of Indianapolis*, Chase National Bank sued the City of Indianapolis, Indianapolis Gas Company, and Citizens Gas Company.[23] Chase was the trustee under a mortgage deed to secure a bond issue executed by Indianapolis Gas.[24] Indianapolis Gas subsequently entered into a ninety-nine-year lease conveying all its property to Citizens Gas, pursuant to which Citizens Gas agreed to assume the

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realign!" yielded 157 cases. Thus, on average over this ten-year period, the entire federal court system heard only 15.7 cases per year involving realignment. This result is actually higher than that found by Jacob Sherkow during a previous ten-year period. *See* Sherkow, *supra* note 8, at 528 n.12 (reporting the use of the same Westlaw search process for the years 1998–2008 with a yield of only 79 cases, an average of 7.9 realignment cases per year). And if one divides the total number of realignment cases since *City of Indianapolis* (*see infra* note 122, finding 362 federal cases) by the 73 years since the 1941 decision, the average is only 4.96 cases per year.

[21] 314 U.S. 63 (1941).

[22] *See id.* at 69–70 ("These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court."). For examples of Supreme Court and lower federal court cases looking at alignment cases, see *id.* at 70 nn.1–2, 75 n.4.

[23] *Id.* at 68.

[24] *Id.* at 70.

payments to Chase of the interest on the bonds.[25] Twenty-two years later, Citizens Gas conveyed its entire property, including the property leased from Indianapolis Gas, to the City of Indianapolis.[26] When the City refused to honor the terms of the lease between Citizens Gas and Indianapolis Gas, Chase sued all three entities, seeking a declaration that the lease between Indianapolis Gas and Citizens Gas was binding on the City of Indianapolis, and also seeking an order that the City perform the lease obligations, including paying Chase the required interest payments.[27]

The City of Indianapolis and Citizens Gas denied that they were bound by the lease and alleged that the controversy actually lay between Indianapolis Gas and the City.[28] The federal district court realigned the parties, moving Indianapolis Gas from defendant to plaintiff.[29] Under some circumstances, this party realignment might have been unremarkable. However, Chase had sued the three defendants in federal court, and the basis for federal subject-matter jurisdiction was diversity.[30] Chase was a New York citizen,[31] but realigning Indianapolis Gas as a plaintiff meant that now there was an Indiana plaintiff and Indiana defendants, thus destroying complete diversity and requiring the lawsuit's dismissal for lack of subject-matter jurisdiction.[32]

On appeal, the Seventh Circuit reversed, finding realignment improper.[33] The Seventh Circuit opined that realignment is only appropriate when the parties are in substantial accord on all of the issues presented, not merely when the parties agree on one issue or some of the issues.[34] On remand, the district court held that the lease was not enforceable against Citizens Gas or the City of Indianapolis, and it entered judgment only against Indianapolis Gas for the interest payments owed to Chase.[35]

On a second appeal to the Seventh Circuit, the appellate court again reversed, finding that the lease was valid and that the assignment did not relieve Citizens Gas of its lease obligations.[36] Accordingly, the Seventh Circuit concluded, Chase

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[25] *Id.*

[26] *Id.* Citizens Gas had been created in 1906, and its franchise provided for its eventual conveyance to the City of Indianapolis, subject to its "outstanding legal obligations." *Id.*

[27] *Id.* at 71.

[28] *Id.*

[29] *Id.*

[30] *See id.* at 68–69.

[31] *Id.* at 68.

[32] *Id.* at 68, 71.

[33] Chase Nat'l Bank v. Citizens Gas Co., 96 F.2d 363, 367 (7th Cir. 1938).

[34] *Id.*

[35] *City of Indianapolis*, 314 U.S. at 72.

[36] Chase Nat'l Bank v. Citizens Gas Co., 113 F.2d 217, 232 (7th Cir. 1940).

was entitled to a declaratory judgment that the lease was valid and enforceable against the parties.[37] The Supreme Court granted certiorari.[38]

Ultimately the Supreme Court reversed the Seventh Circuit in a five-to-four decision, holding that the district court's original realignment had been proper and that the realignment divested the federal courts of jurisdiction.[39] But the Court's conclusion is of less interest than its analysis in reaching that conclusion.

Consistent with realignment's long history but paucity of discussion, the Supreme Court's summation is easily set forth:

> Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute. . . . Whether the necessary collision of interest exists, is therefore not to be determined by mechanical rules. It must be ascertained from the principal purpose of the suit and the primary and controlling matter in dispute.[40]

In applying these concepts to the dispute in *City of Indianapolis*, the majority opinion offered a two-part analysis. First, the majority characterized the lawsuit as turning on the validity of the lease, thus concluding that the lease's validity was the principal purpose of the lawsuit:

> The facts leave no room for doubt that on the merits only one question permeates this litigation: Is the lease whereby Indianapolis Gas in 1913 conveyed all its gas plant property to Citizens Gas valid and binding upon the City? This is the primary and controlling matter in dispute. The rest is window-dressing designed to satisfy the requirements of diversity jurisdiction. Everything else in the case is incidental to this dominating controversy, with respect to which Indianapolis Gas and the City, citizens of the same state, are on opposite sides. . . . Chase and Indianapolis Gas have always been united on this issue: both have always contended for the validity of the lease and the City's obligation under it.[41]

Second, the majority noted that with respect to the issue of the lease's validity, the interests of Indianapolis Gas were aligned with Chase rather than with the City of Indianapolis:

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[37] *Id.*
[38] *City of Indianapolis*, 314 U.S. at 72.
[39] *See id.* at 74–75.
[40] *Id.* at 69 (citations omitted) (internal quotation marks omitted).
[41] *Id.* at 72–73 (footnote omitted) (internal quotation marks omitted).

> Chase and Indianapolis Gas are, colloquially speaking, partners in litigation. The property covered by the lease is now in the City's possession; Chase is simply acting to protect the bondholders' security. As to Indianapolis Gas, if the lease is upheld, it will continue to receive a six per cent return on its capital, and the burden of paying the interest on its bonded indebtedness will be not upon it but upon the City. What Chase wants Indianapolis Gas wants and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase when, as a matter of fact, the interests of the City and of Indianapolis Gas are opposed to one another.[42]

Four Justices dissented in *City of Indianapolis*, describing the majority's realignment as "radical" and observing that the majority "forces into the position of co-plaintiff one party which the District Court adjudged entitled to recover over a million dollars and another which the District Court adjudged solely liable to pay that sum."[43]

With this basic background, we turn to an analysis of the flaws in the rationale of the *City of Indianapolis* majority opinion that undermine its approach to realignment and have created confusion among the circuits.

III. SMOKE GOT IN THEIR EYES: THE FLAWS IN THE *CITY OF INDIANAPOLIS* MAJORITY OPINION

In this Part, we examine the *City of Indianapolis* majority opinion more closely and analyze the flaws that undermine its approach to realignment. Our analysis discusses the majority opinion's focus on realignment in the specific context of diversity jurisdiction and examines the cases upon which the *City of Indianapolis* majority relied. We conclude that the majority unduly focused on the diversity-jurisdiction context in which the realignment issue arose—a focus that may have been motivated by Justice Frankfurter's personal opposition to diversity jurisdiction—and that the majority appears to have stretched its cited precedents to support realignment based on a principal-purpose theory.

A. The Majority Opinion and Diversity Jurisdiction

Any analysis of the doctrine of realignment must consider *City of Indianapolis*. As a practical matter, no circuit court could simply disregard the Supreme Court's decision, and the Supreme Court itself would have to acknowledge *City of Indianapolis* even if it sought to overrule it. Although we have summarized the case above,[44] we here offer a sharpened analysis.

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[42] *Id.* at 74.

[43] *Id.* at 78–79 (Jackson, J., dissenting).

[44] *See supra* notes 21–43 and accompanying text.

As we have seen, the *City of Indianapolis* majority stated that diversity jurisdiction's "governing principles" required an "actual" and "substantial" controversy and that the "necessary collision of interests . . . [must] be ascertained from the principal purpose of the suit and the primary and controlling matter in dispute."[45] Subsequent federal circuit court decisions, of course, all recognize *City of Indianapolis* as controlling. However, by focusing on different language within the majority opinion, the circuits have split into two camps: some circuits have adopted the "substantial controversy" test; others have adopted the "principal purpose" test.[46]

Pursuant to the substantial-controversy test, so long as there is an actual or substantial conflict between adverse litigants, the federal court will not realign the parties.[47] In contrast, the principal-purpose test requires a court to determine which issue "permeates [the] litigation"—the "dominating controversy" to which "[e]verything else in the case is incidental" or mere "window-dressing."[48] Pursuant to the principal-purpose test, the federal court must sort through the issues within the lawsuit, determine the lawsuit's principal purpose, and align the parties according to their positions with respect to that particular issue. Determining the litigation's principal purpose not only requires a substantive inquiry, but it also potentially requires the court to engage in speculation.[49] The result is that the principal-purpose test is simultaneously more complicated in its analysis and narrower in its satisfaction than the substantial-controversy test: it is easier to find a "substantial controversy" between parties within the lawsuit generally than to

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[45] *City of Indianapolis*, 314 U.S. at 69 (citations omitted) (internal quotation marks omitted); *see supra* note 40 and accompanying text.

[46] The Second, Seventh, and Eighth Circuits employ the substantial-controversy test. *See* Md. Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 622 (2d Cir. 1994) (referring to the substantial-controversy test as "a broader 'collision of interests' test" and adopting that test); Am. Motorists Ins. Co. v. Trane Co., 657 F.2d 146, 151 (7th Cir. 1981); Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 870 (8th Cir. 1966). The Third, Fourth, Fifth, Sixth, and Ninth Circuits apply the principal-purpose test. *See* U.S. Fid. & Guar. Co. v. A&S Mfg. Co., 48 F.3d 131, 132 (4th Cir. 1995); U.S. Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992); Emp'rs Ins. of Wausau v. Crown Cork & Seal Co., 905 F.2d 42, 45 (3d Cir. 1990); Zurn Indus., Inc. v. Acton Constr. Co., 847 F.2d 234, 236 (5th Cir. 1988); Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 (9th Cir. 1987); *see also* Saylab v. Hartford Mut. Ins. Co., 271 F. Supp. 2d 112, 116 (D.D.C. 2003) (using the substantial-controversy test).

[47] *E.g.*, *Trane*, 657 F.2d at 149 ("Realignment is proper when the court finds that no actual, substantial controversy exists between parties on one side of the dispute and their named opponents . . . .").

[48] *City of Indianapolis*, 314 U.S. at 72.

[49] *See id.* at 80 (Jackson, J., dissenting) (observing that the primary purpose of the litigation "depends on the outcome of the litigation" and thus cannot be known at the litigation's outset); Sherkow, *supra* note 8, at 542 (stating that the principal purpose determination "is invariably one of substance").

demonstrate that such a substantial controversy exists within the "principal purpose" of the litigation specifically.[50]

Two issues underlie the competition between the substantial-controversy and principal-purpose tests. First, the *City of Indianapolis* majority clearly did not intend to create two alternative standards—the majority was presenting a linear progression of thought in which determining the actual and substantial controversy required an examination of the lawsuit's principal purpose. In other words, the majority was presenting a single test, rather than providing two alternative, equally acceptable tests. Second, the majority's analysis focused unduly on the specific diversity-jurisdiction context in which the realignment issue arose.

The language in *City of Indianapolis*, from which the federal circuit courts have drawn their competing approaches to realignment, is found within a single paragraph. The paragraph opens with a discussion of the governing principles of diversity jurisdiction,[51] and does not refer to "alignment" until the paragraph's final sentence. The repeated references to diversity jurisdiction are distracting because they seem to suggest that the "standards" discussed in that paragraph reflect diversity requirements rather than realignment requirements. This approach reflects the majority's erroneous focus on tying realignment specifically and exclusively to diversity jurisdiction rather than acknowledging its applicability to federal cases more generally, regardless of the basis for federal subject-matter jurisdiction.[52]

Diversity was the basis for federal subject-matter jurisdiction in *City of Indianapolis*,[53] and certainly the Court was acutely aware that its decision to realign the parties in this instance would destroy the necessary complete diversity of citizenship.[54] However, the majority's fixation on the diversity-jurisdiction context of *City of Indianapolis* is the source of the opinion's flaws.

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[50] *See* John B. Oakley, *Fiat Lux*, 51 DUKE L.J. 699, 709 n.25 (2002) (noting that the principal-purpose test "favors realignment," whereas the substantial-controversy test "generally defers to the structure of the litigation as framed by the complaint").

[51] *City of Indianapolis*, 314 U.S. at 69 ("To sustain *diversity jurisdiction* there must exist an 'actual,' 'substantial' controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side." (emphasis added) (citations omitted)) .

[52] *Id.* ("The specific question is this: Does an alignment of the parties in relation to their real interests in the 'matter in controversy' satisfy the settled requirements of *diversity jurisdiction*?" (emphasis added)); *see also id.* at 70 ("These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court."). The majority returned to diversity at the end of its opinion, noting the constitutional and statutory boundaries of the federal courts' diversity jurisdiction, as well as the necessity for a "strict construction" of the diversity jurisdiction statute to comport with "Congressional policy." *Id.* at 76–77 (quoting Healy v. Ratta, 293 U.S. 263, 270 (1934)).

[53] *Id.* at 68–69.

[54] *Id.* at 74–77.

The historical purpose behind diversity jurisdiction is unclear,[55] and its utility has long been controversial.[56] The continued necessity for diversity jurisdiction has been hotly debated on many occasions,[57] generating extensive commentary in the legal literature.[58] Justice Frankfurter participated actively in this debate, and

[55] *See* H.R. REP. NO. 95-893, at 2 (1978) ("The debates of the Constitutional Convention are unclear as to why the Constitution made provision for [diversity] jurisdiction; nor is pertinent legislative history much aid as to why the First Congress exercised its prerogative to vest diversity jurisdiction in the Federal courts."); *see also* WRIGHT ET AL., *supra* note 8, § 3601, at 12 ("Neither the debates of the Constitutional Convention nor the records of the First Congress shed any substantial light on why diversity jurisdiction was granted to the federal courts by the Constitution or why the First Congress exercised its option to vest that jurisdiction in the federal courts."); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484–87 (1928) (noting the records of the Constitutional Convention provide little help in determining the reasons behind the diversity clause).

[56] *See* WRIGHT ET AL., *supra* note 8, § 3601, at 20–22 ("[T]he question of what purpose is served by diversity jurisdiction has retained its controversial character over the years. Time only has exacerbated the disagreements stirred at the time of the ratification debates."); Friendly, *supra* note 55, at 487 ("On no section of the new Constitution was the assault more bitter than on the provisions for the federal judiciary. . . . [D]iversity of citizenship jurisdiction came in for its share of criticism."); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1 (1964) ("While there are other segments of federal jurisdiction as old as diversity, probably none is as controversial. From the beginning, proposals have been made to abolish or substantially curtail diversity jurisdiction and many words have been written in support of, or in opposition to, such proposals."); *id.* at 3–4 ("The lack of recorded opposition in the Constitutional Convention should not be taken as an indication of complete acceptance of diversity jurisdiction. Sharp attacks were soon launched in the state ratifying conventions, the first Congress, and the press.").

[57] *See* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 98 (noting that "[e]very administration since President Carter's, the Judicial Conference, the American Law Institute, state courts, numerous public interest and legal aid organizations, and most legal scholars support the abolition or curtailment of diversity").

[58] *See, e.g.*, Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 193 (1929) (supporting diversity jurisdiction); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 4–8 (1968) (supporting limits on diversity jurisdiction); John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 7–9 (1963) (supporting diversity jurisdiction); John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 406 (1979) (arguing that, due to diversity's longevity, it should not be altered without a compelling reason); Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 314 (1979) (stating that diversity jurisdiction is "an idea whose time has passed"); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 201–05 (1982) (supporting the continuing operation of diversity jurisdiction); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177, 180 (1980) (supporting abolition of diversity jurisdiction); David L. Shapiro, *Federal Diversity*

his disdain for diversity jurisdiction is well documented.[59] We are not the first to posit that his personal opposition to diversity jurisdiction might have played a role in his approach to realignment in *City of Indianapolis*.[60]

Of course, if the analysis and rationale in *City of Indianapolis* were correct, then Justice Frankfurter's personal opinions regarding diversity jurisdiction become a largely irrelevant historical aside. But Justice Frankfurter's analysis is problematic, as we shall see.

B. The Majority's Use of Precedent in City of Indianapolis

City of Indianapolis did not purport to overrule any of the Supreme Court's prior decisions nor to create a new test for determining when realignment is proper.[61] Indeed, the majority opinion cited to six prior Supreme Court decisions in its summary discussion of the realignment standard.[62] One of those decisions,

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Jurisdiction: A Survey and A Proposal, 91 HARV. L. REV. 317, 317 (1977) (proposing that "the decision to retain, curtail, or abolish diversity jurisdiction should be made by each judicial district individually"); Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 194–98 (1969) (arguing that diversity jurisdiction should be severely limited). *See generally* Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 119–36 (2003) (detailing the historical background of diversity jurisdiction).

[59] Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 521–22 (1928) (arguing that there are no longer valid reasons for diversity jurisdiction); *see also* Felix Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. 1097, 1097 (1931) (urging the legislature to remove "some obvious abuses of diversity jurisdiction"); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 HARV. L. REV. 834, 871 (1927) (arguing that any attempt to relieve an overburdened federal judiciary may result in reexamination of the justification for diversity jurisdiction).

[60] Braverman, *supra* note 8, at 1096–1102 (asserting that "Justice Frankfurter's deep hostility toward diversity jurisdiction led him to questionable interpretations of Supreme Court precedents [in *City of Indianapolis*] and to a rule that enabled the Court to dismiss a case that properly belonged in federal court"); Everette, *supra* note 8, at 1994 (noting that "Justice Frankfurter, the author of the majority opinion in [*City of*] *Indianapolis*, opposed diversity jurisdiction throughout his tenure and attempted to place limits upon it"); Sherkow, *supra* note 8, at 531, 533 (noting that Justice Frankfurter "was a frequent academic contributor to attacks on diversity jurisdiction" and that the Court "may have seen realignment . . . as an attractive tool with which to control diversity jurisdiction").

[61] *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 70 (1941) (citing cases and noting that "familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court").

[62] *Id.* at 69–70 (citing Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77 (1920); Helm v. Zarecor, 222 U.S. 32 (1911); City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178 (1905); Merchants' Cotton Press & Storage

Strawbridge v. Curtiss,[63] was cited solely in support of the complete diversity requirement[64] and thus adds nothing to our discussion. However, a brief look at the remaining five decisions is helpful because the examination suggests that the *City of Indianapolis* majority stretched these cited precedents in its attempt to proffer them as supporting authority for the principal-purpose test.

East Tennessee, Virginia & Georgia Railroad Co. v. Grayson[65] involved a minority shareholder who sought to set aside a lease that arguably exceeded the corporation's corporate powers and prevented a settlement payment that would have cancelled the lease.[66] The *East Tennessee* Court specifically referred to "[t]he principal purpose of the suit"[67] in its analysis, and thus the case indeed supports the *City of Indianapolis* majority's position.

In another decision, *Helm v. Zarecor*,[68] the Court reversed the district court's realignment of a corporate party from defendant to plaintiff, even though the corporation's board agreed with the position of the plaintiffs. The Court stated that "the relation of the corporation to the controversy is not to be determined by the attitude of alleged members of the Board . . . . These do not suffice to identify the interest of the corporation with that of the complainants."[69] *Helm* makes no specific mention of examining the principal purpose of the litigation, but the Court refers twice to "*the* controversy"[70] and also to "*the* object of their suit,"[71] which suggests that there was only one controversy—and accordingly, that no inquiry into the litigation's principal purpose would have been necessary.

Another case, *City of Dawson v. Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co.*,[72] involved a realignment of the parties due to an improper creation of diversity jurisdiction. As characterized by the Supreme Court,

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Co. v. Ins. Co. of N. Am., 151 U.S. 368 (1894); E. Tenn., Va. & Ga. R.R. v. Grayson, 119 U.S. 240 (1886)). The majority discussed an additional case at length later in its opinion. *Id.* at 75 n.4 (discussing Sutton v. English, 246 U.S. 199 (1918)). Accordingly, we address that additional case later in this section. *See infra* notes 86–88 and accompanying text.

[63] 7 U.S. (3 Cranch) 267 (1806).

[64] *City of Indianapolis*, 314 U.S. at 69 (citing *Strawbridge* for the proposition that diversity jurisdiction requires a "controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side").

[65] 119 U.S. 240 (1886).

[66] *Id.* at 243.

[67] *Id.* at 244.

[68] 222 U.S. 32 (1911).

[69] *Id.* at 38.

[70] *Id.* at 33, 37 (emphasis added).

[71] *Id.* at 37 (emphasis added).

[72] 197 U.S. 178 (1905).

> it is obvious that the Water Works Company is on the plaintiff's side and was made a defendant solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State. . . . [W]hen the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed.[73]

However, *City of Dawson* concluded that "[n]o difference or collision of interest or action is alleged or even suggested"[74] without mention of the principal purpose—language implying that had any collision of interest existed, the Court would not have realigned the parties. In *City of Indianapolis*, the Court accurately cites *City of Dawson* for its "necessary 'collision of interest'" language.[75] However, the majority also cites *City of Dawson* to support its conclusion,[76] suggesting that the majority considered *City of Dawson* to require an examination of the principal purpose of the litigation[77]—which it does not.

The *City of Indianapolis* majority also cited *Niles-Bement-Pond Co. v. Iron Moulders Union*.[78] In this case, the Court concluded that one of the defendants, Niles Tool Works Company, was essentially a subsidiary of the plaintiff, Niles-Bement-Pond, such that, as the circuit court of appeals found, "its interest in the controversy was so certainly on the same side, that it should be treated as a plaintiff."[79] In reaching that conclusion, the Supreme Court stated that because Niles-Bement-Pond held the majority of the tool company's stock, "any substantial controversy" between the two was impossible. *City of Indianapolis* cited *Niles-Bement-Pond* as requiring a substantial controversy, which it did.[80] Again, however, *Niles-Bement-Pond* mentions only the necessity of a substantial controversy, making no mention of the litigation's principal purpose. To that extent, the citation is arguably misleading as supporting authority for the principal-purpose test.[81]

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[73] *Id.* at 180–81.

[74] *Id.* at 181.

[75] City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (quoting City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 181 (1905)).

[76] *City of Indianapolis*, 314 U.S. at 74–75 & n.4.

[77] *See* Braverman, *supra* note 8, at 1108–09 (stating that Justice Frankfurter "misconstrued precedent in declaring that judges must look only to the primary purpose of the suit" and using *City of Dawson* as an example).

[78] 254 U.S. 77 (1920).

[79] *Id.* at 78.

[80] *City of Indianapolis*, 314 U.S. at 69.

[81] *See* Braverman, *supra* note 8, at 1107 ("The *Niles-Bement-Pond* Court's use of the phrase 'any substantial controversy' suggests that there might have been more than one

The remaining cited case, *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*,[82] involved realignment in the context of removal. The case indeed refers to the potential for arranging parties "on opposite sides of the primary and controlling matter in dispute."[83] However, despite that reference, the Court analyzed all of the matters in the litigation, ultimately concluding that removal of the case from state to federal court was improper under any potential configuration.[84] Accordingly, it appears that only one of the five cases cited by the *City of Indianapolis* majority in setting forth its realignment standard truly required that parties be aligned solely according to the principal purpose of the lawsuit.[85]

We examine one additional case here because the *City of Indianapolis* majority cited it elsewhere in its opinion, as did the dissent. *Sutton v. English*[86] was a suit to set aside a will and distribute property among the testator's heirs. The Supreme Court found the district court's realignment of a party from defendant to plaintiff improper, even though the Court observed that the defendant's interest was the same as the plaintiffs' with respect to three of the four objects of the litigation. The Court noted that before the district court could reach the three common interests, the remaining claim had to first be addressed—"and with respect to this her interest was altogether adverse to [the plaintiffs]. Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy."[87] As characterized by one commentator, *Sutton* offered something for everyone:

> To the majority in *City of Indianapolis*, the *Sutton* case was a clear holding that parties must be aligned according to their attitude toward the actual controversy, while the dissenters found comfort in the fact that the Court in *Sutton* held it error to align one of the defendants with the plaintiff when that defendant's interest was adverse to the plaintiff on only one out of four issues.[88]

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controversy between pleaded adversaries that would justify maintaining their position on opposite sides of the controversy.").

[82] 151 U.S. 368 (1894).

[83] *Id.* at 385.

[84] *See id.* at 385–87; *see also* Braverman, *supra* note 8, at 1108 (noting that "*Merchants' Cotton-Press* does not require, as [Justice] Frankfurter concluded it did, that courts must first identify a single primary and controlling issue and arrange the parties accordingly").

[85] *See* E. Tenn., Va. & Ga. R.R. v. Grayson, 119 U.S. 240, 243–44 (1886).

[86] 246 U.S. 199 (1918).

[87] *Id.* at 204.

[88] WRIGHT ET AL., *supra* note 8, at § 3607, at 325 (alteration in original) (footnote omitted).

In sum, one could argue that the *City of Indianapolis* majority stretched its cited precedents in mandating that the propriety of realignment must be ascertained from the lawsuit's principal purpose. This is particularly true because the only cited case expressly employing the principal-purpose test was the oldest of the five decisions;[89] the four more recent decisions reflected a retreat from that approach.

From here, we turn to the majority's final and fatal flaw: its disregard of realignment's ultimate purpose in ensuring the adversity necessary to the constitutional case-or-controversy requirement. Accordingly, the following Part analyzes the purposes and underpinnings of the federal doctrine of realignment and, in doing so, reestablishes realignment's constitutional foundation.

IV. REALIGNMENT'S PURPOSES AND CONSTITUTIONAL UNDERPINNINGS

In its paragraph describing the governing principles of realignment, the *City of Indianapolis* majority's repeated use of "diversity jurisdiction" rather than "realignment" highlights the ultimate relationship of realignment to jurisdiction but unfortunately does so in a misleading fashion. As this Part will explain, realignment's purpose and constitutional underpinnings lie in ensuring that a lawsuit satisfies the case-or-controversy requirement,[90] which is an issue of justiciability rather than jurisdiction.[91]

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[89] *Compare* E. Tenn., Va. & Ga. R.R. v. Grayson, 119 U.S. 240 (1886) (employing the principal-purpose test), *with* Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77, 79 (1920) (requiring a substantial controversy), Helm v. Zarecor, 222 U.S. 32, 33, 37 (1911) (referring to "the controversy" and the "object of the suit"), City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 181 (1905) (stating a "collision of interest" standard would prevent realignment), *and* Merchants' Cotton-Press & Storage Co. v. Ins. Co. of N. Am., 151 U.S. 368, 385 (1894) (noting the potential for arranging parties "on opposite sides of the primary and controlling matter in dispute").

[90] *See infra* notes 92–118 and accompanying text.

[91] Virginia v. Hicks, 539 U.S. 113, 120 (2003) (referring to the "limitations of a case or controversy or other federal rules of justiciability") (quoting ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989)). As explained in *Flast v. Cohen*:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-or-controversy doctrine.

Theoretically, the federal courts could have adopted an absolutist "plaintiff as master of the claim" approach, whereby the plaintiff's configuration of the litigation would have been unassailable. But the federal courts have declined to take such an approach, instead choosing to authorize the option of party realignment in federal cases. This option better serves realignment's purpose, which is rooted in the Constitution's case-or-controversy requirement.[92]

A logical starting point in discussing the case-or-controversy requirement is the meaning of the phrase "case or controversy." There is support in both case law[93] and legal commentary[94] for the notion that "case" is a broader term than "controversy." Although some have dissented from that view,[95] we need not tarry long over any possible distinction in definition; the significant point for our purposes is that "more than three hundred years of legal practice and tradition

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392 U.S. 83, 94–95 (1968); *see also* Warth v. Seldin, 422 U.S. 490, 498 (1975) (defining justiciability as "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III"). Viewing the jurisdiction/justiciability distinction in another context, the Supreme Court has explained that the constitutional conferral of federal subject-matter jurisdiction within Article III, Section 2 over lawsuits in which one state is suing another state is only one part of the inquiry:

> By the Judiciary Article of the Constitution, the judicial power extends to controversies between states, and this Court is given original jurisdiction of cases in which a state shall be a party. The present suit is between states, and the other jurisdictional requirements being satisfied, . . . our constitutional authority to hear the case and grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable "case" or "controversy'" within the meaning of the Constitutional provision . . . .

Texas v. Florida, 306 U.S. 398, 405 (1939) (citations omitted).

[92] U.S. CONST. art. III, § 2.

[93] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–41 (1937); Muskrat v. United States, 219 U.S. 346, 356–57 (1911); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431, 432 (1793); *In re* Pac. Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887).

[94] *See, e.g.*, William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 266 (1990) (noting that historically, "[t]he term 'case' referred to 'all cases, whether civil or criminal.' The term 'controversy' meant only disputes 'of a civil nature.'") (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE app. note E at 420–21 (Philadelphia 1803), *available at* http://www.lonang.com/exlibris/tucker/tuck-1e.htm) (emphasis omitted).

[95] *See, e.g.*, Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 460 (1994); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1636 (1990); Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 566 (2006).

establish a presumption that the word 'case,' like the word 'controversy,' requires an adversarial suit."[96]

The legal commentary occasionally has overlooked the necessity for an adversarial context,[97] perhaps due to other, more colorful and complicated justiciability doctrines, such as standing, mootness, ripeness, and political questions.[98] Fortunately, however, the Supreme Court and some prominent commentators have provided an ample foundation for our discussion.

As noted above, the case-or-controversy requirement is a doctrine of justiciability rather than jurisdiction.[99] Justiciability is distinct from jurisdiction,[100]

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[96] Redish & Kastanek, *supra* note 95, at 565; *see id.* at 548 ("There is simply no rational means of defining the terms 'case' or 'controversy' to include a proceeding in which, from the outset, nothing is disputed and the parties are in complete agreement.").

[97] *See, e.g.*, Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (discussing the "case or controversy" requirement by means of exploring standing, mootness, and ripeness, but not discussing the adversarial requirement).

[98] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (noting that standing, mootness, ripeness, and political questions all originate in the case or controversy language); William R. Casto, *Foreign Affairs Crises and the Constitution's Case or Controversy Limitation: Notes from the Founding Era*, 46 AM. J. LEGAL HIST. 237, 237 (2004) (mentioning standing, mootness, advisory opinions, ripeness, and political questions as within the case-or-controversy requirement). *But see* Recent Developments, *Construction of Immigration Act in Advance of Enforcement Denied for Lack of Case or Controversy*, 54 COLUM. L. REV. 1144, 1144 (1954) [hereinafter *Construction of Immigration Act*] ("[T]he constitutional limitation that courts created by Article III may decide only cases or controversies operates to eliminate from the deliberation of these courts all cases deemed moot, advisory, *non-adversary*, or overly hypothetical . . . .") (emphasis added) (footnotes omitted).

> Although the Supreme Court expressly refers to the ban on advisory opinions less frequently than the other justiciability doctrines, this should not be taken as an indication that it is less important. Quite the contrary, it is because the prohibition of advisory opinions is at the core of Article III that the other justiciability doctrines exist largely to ensure that federal courts will not issue advisory opinions. That is, it is because standing, ripeness, and mootness implement the policies and requirements contained in the advisory opinion doctrine that it is usually unnecessary for the Court to separately address the ban on advisory opinions.

ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, at 54 (6th ed. 2012).

[99] *See supra* note 91 and accompanying text.

[100] Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 529–30 (2006) ("Our judiciary considers distinct such concepts as cause of action, jurisdiction (both personal and subject matter), [and] justiciability, . . . and satisfying judicial requirements in one category often will have no effect on another.").

and as the Supreme Court explained in *Baker v. Carr*,[101] this distinction "is significant."[102] The necessity of an adversarial context is part of the firmly established prohibition against the federal courts' issuance of advisory opinions:[103] "[F]or a case to be justiciable, and for it not to be a request for an advisory opinion, there must be an actual dispute between adverse litigants . . . ."[104] The Supreme Court has given further explanation:

> The Constitution [Article III, Section 2] limits the exercise of the judicial power to "cases" and "controversies." . . .
>
> A "controversy" in this sense must be one that is appropriate for judicial determination. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.[105]

The Court has repeatedly emphasized that the adversarial context is crucial to satisfying the case-or-controversy requirement.[106] "The Court has found unfit for

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[101] 369 U.S. 186 (1962).

[102] *Id.* at 198. "A federal court cannot 'pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" *Id.* at 204 (quoting Liverpool, N.Y. & Phila. Steam-Ship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

[103] CHEMERINSKY, *supra* note 98, § 2.2, at 46–47.

> [T]he justiciability doctrines are intended to improve judicial decision making by providing the federal courts with concrete controversies best suited for judicial resolution. . . . [T]he requirement for cases and controversies "limit[s] the business of federal courts to questions presented in an adversary context . . . ." Because federal courts have limited ability to conduct independent investigations, they must depend on the parties to fully present all relevant information to them. It is thought that adverse parties, with a stake in the outcome of the litigation, will perform this task best.

Id. at 44; *see also id.* § 2.2, at 46 ("The core of Article III's limitation on federal judicial power is that federal courts cannot issue advisory opinions."); *see id.* § 2.2, at 52–54 (discussing whether declaratory judgments constitute "impermissible advisory opinions").

[104] *Id.* § 2.2, at 52.

[105] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–41 (1937).

[106] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 95 (1968) (noting that cases before the federal courts must be "presented in an adversary context"); United States v. Johnson, 319 U.S. 302, 304 (1943) (refusing to reach the merits of the case because there was no "genuine adversary issue between the parties" as mandated by the case-or-controversy requirement); Muskrat v. United States, 219 U.S. 346, 361–62 (1911) (concluding that the defendant—the U.S. Government—had "no interest adverse to the claimants," and thus the case presented no justiciable controversy); Lord v. Veazie, 49 U.S. 251, 254–55 (1850) (if the parties' interests are "one and the same," they do not present a justiciable case). *See*

adjudication any cause that is not in any real sense adversary, [and] that does not assume the honest and actual antagonistic assertion of rights to be adjudicated . . . ."[107] As one law review article has noted, "The Court has widely held that the case-or-controversy language of Article III mandates litigant adverseness. For a suit to be justiciable, according to the Court, the parties must maintain 'adverse legal interests' throughout, and their dispute must be 'definite and concrete.'"[108]

Other legal commentary, as one might expect in light of the Supreme Court's consistency on this issue, has also supported this view. As noted in a 1927 *Harvard Law Review* article, "The first essential of a case or controversy is that there be interested parties asserting adverse claims."[109] A 1954 *Columbia Law Review* article echoed, "The case or controversy limitation . . . requires that a concrete problem be presented to the court by parties actually in dispute."[110]

Professors Martin Redish and Andrianna Kastanek have addressed the centrality of litigant adverseness to the case-or-controversy requirement in the context of settlement class actions, stating that "[a]ccording to both textual and doctrinal interpretations of Article III, the case-or-controversy requirement unambiguously mandates the existence of an adversarial relationship between opposing litigants."[111] These commentators also noted that the case or controversy's adverseness requirement has a long reach: "For purposes of Article III's adverseness requirement, . . . the term ['collusion'] has a [broad] meaning. It includes *any* suit in which, from the outset, the parties are in agreement as to the outcome."[112]

Whether phrased as "actual and adversary,"[113] "an adversary context,"[114] "adverse legal interests,"[115] or "litigant adverseness,"[116] the case-or-controversy requirement clearly requires adversity in the parties' legal positions. Both the adoption of an adversarial (as contrasted with an inquisitorial) system[117] and the

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Redish & Kastanek, *supra* note 95, at 548 ("[F]rom both historical and doctrinal perspectives, Supreme Court decisions could not be more certain that Article III is satisfied only when the parties are truly 'adverse' to one another . . . .").

[107] Poe v. Ullman, 367 U.S. 497, 505 (1961) (internal quotation marks omitted).

[108] Redish & Kastanek, *supra* note 95, at 567 (footnotes omitted) (quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240–41).

[109] Note, *What Constitutes a Case or Controversy Within the Meaning of Article III of the Constitution*, 41 HARV. L. REV. 225, 233 (1927).

[110] *Construction of Immigration Act*, *supra* note 98, at 1144–45.

[111] Redish & Kastanek, *supra* note 95, at 570.

[112] *Id.* at 551.

[113] Coffman v. Breeze Corp., 323 U.S. 316, 324 (1945) (citations omitted).

[114] Flast v. Cohen, 392 U.S. 83, 95 (1968).

[115] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937).

[116] Redish & Kastanek, *supra* note 95, at 567.

[117] *Id.* at 571 ("[L]itigant adverseness serves as an essential ingredient in the protections and incentives upon which the adversary system depends, including the creation of a well-balanced, well-developed record to facilitate informed judicial decisionmaking.");

reliance on precedent and preclusion doctrines[118] render logical the requirement of an adversarial relationship between litigating parties. This necessity of adverse legal interests is not restricted to diversity cases but is instead required in all federal cases, regardless of the basis for federal subject-matter jurisdiction.

For lawsuits founded on diversity jurisdiction, the joinder of parties must be legitimate—there must be a "real cause of action . . . asserted against [the defendant] by the plaintiff."[119] Indeed, requiring legitimate diversity of citizenship and avoiding the improper manipulation of diversity jurisdiction is crucial to sustaining the validity of the federal courts. However, realignment is not the only means of achieving legitimate diversity of citizenship; several alternatives protect the integrity of diversity jurisdiction. For example, Section 1359 prohibits improper or collusive joinder designed to create diversity jurisdiction. In addition, fraudulent joinder authorizes federal courts to look beyond the face of the complaint to ensure that the plaintiff has a colorable claim against a nondiverse defendant. If not, the citizenship of that nondiverse defendant is disregarded, permitting the case to proceed in federal court.[120]

In sum, the federal courts' power to realign parties furthers the constitutional case-or-controversy requirement by ensuring that the parties are aligned so as to have the requisite adverse legal interests; indeed, this is the very purpose of realignment. For this reason, the doctrine of realignment potentially can be invoked in any federal lawsuit rather than being restricted solely to diversity cases[121]—the federal court can realign the parties to ensure adverse legal interests even when, as in the instance of arising-under cases, realignment has no impact whatsoever on the court's subject-matter jurisdiction. Characterizing realignment as within the rubric of jurisdiction generally, or diversity jurisdiction specifically, is therefore inaccurate.

The underdevelopment of the doctrine of realignment as a crucial tool for ensuring the existence of a case or controversy in federal court is a serious

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id. at 572 ("The requirement that litigants on opposite sides have 'adverse' legal interests for a suit to be justiciable is appropriately viewed as a logical outgrowth of the nation's commitment to an adversary system.").

[118] *Id.* at 576–82. "[T]he case-or-controversy requirement demands true adverseness between opposing litigants at the outset of suit, because absent such adverseness we cannot be assured that the litigants will effectively protect the interests of affected individuals not currently before the court." *Id.* at 580.

[119] City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 80 (1941) (Jackson, J., dissenting).

[120] *See* Sherkow, *supra* note 8, at 553–59 (advocating for the abolition of the realignment doctrine, as well as discussing how amendments to Section 1359 and the fraudulent joinder doctrine may be used by the courts to limit fraudulent or improper joinders in diversity cases and how courts may expand the concept of direct action under Section 1332(c)(1) to deny realignment where realignment itself creates a direct action).

[121] *See supra* note 9 and accompanying text (discussing the importance of alignment in federal-question and diversity cases alike).

omission in federal court jurisprudence. It is to this task that we now turn. Accordingly, our next step is to set forth the appropriate approach to realigning parties—an approach that both is practical and pays proper homage to realignment's constitutional purpose.

V. A PROPOSAL FOR DETERMINING WHEN REALIGNMENT IS APPROPRIATE

The ultimate issue in realignment is whether the lawsuit, as configured, satisfies the constitutional case-or-controversy requirement. In other words, the federal court must determine whether the parties possess sufficiently adverse legal interests such that the court has the constitutional power to hear the case. However, out of 362 federal decisions addressing realignment since the *City of Indianapolis* decision, only fourteen have noted realignment's relationship to the case-or-controversy requirement.[122] Moreover, twelve of the fourteen decisions mentioning the case-or-controversy requirement in the context of realignment mentioned the constitutional doctrine only in passing.[123] Thus, even those courts

[122] Searching all published federal decisions on Westlaw without a date restriction, using the Allfeds database and the search terms "'Indianapolis v. Chase' & realign!" yielded 362 cases. Revising the search terms to "'Indianapolis v. Chase' and 'case or controversy' w/20 realign!" yielded fourteen cases.

[123] Md. Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 622 (2d Cir. 1993) (quoting a single sentence from 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.74[1], at 771 (2d ed. 1993) but no other reference to, or analysis of, the case or controversy requirement); *see also* Cal. Cas. Gen. Ins. Co. v. Nelson, No. 13-0773-CV-W-ODS, 2013 WL 6410637 at *1 (W.D. Mo. Dec. 9, 2013) (mentioning the case-or-controversy relationship in a single sentence without further analysis); Norfolk S. Ry. Co. v. Emjay Envtl. Recycling, Ltd., No. 09–CV–1322, 2012 WL 976056 at *4–5 (E.D.N.Y. March 19, 2012) (simply citing MOORE, *supra*, for the constitutional standard for alignment); Kucher v. Exceeding Expectations, Inc., No. 1:12–CV–00169, 2012 WL 1802311 at *2 (N.D.N.Y. May 17, 2012) (same); Portfolio Recovery Assocs., L.L.C. v. Harstad, No. 2:11-CV-04185-NKL, 2011 WL 5526043 at *3 (W.D. Mo. Nov. 14, 2011) (mentioning the case-or-controversy relationship in a single sentence without further analysis); Gurney's Inn Resort & Spa Ltd. v. Benjamin, 743 F. Supp. 2d 117, 121 (E.D.N.Y. 2010) (same); Wheat v. U.S. Trust Co., N.A., No. 3:08–CV–635, 2008 WL 4829840 at *2 (D. Conn. Nov. 4, 2008) (same); Steele v. Mid-Continent Cas. Co., No. 07–60789–CIV, 2007 WL 3458543 at *4 (S.D. Fla. Nov. 14, 2007) (mentioning the case-or-controversy relationship in a single sentence without any other reference or analysis); McCleary v. DaimlerChrysler Corp., No. 01–0839–CV–W–3–ECF, 2001 WL 1339412 at *1 (W.D. Mo. Oct. 17, 2001) (noting "the Constitutional requirement of an actual case or controversy between the parties" without more); Fed. Ins. Co. v. Bill Harbert Constr. Co., 82 F. Supp. 2d 1331, 1334 (S.D. Ala. 1999) (noting that realignment's purpose is to ensure there is a "true case or controversy" without more); Fed. Ins. Co. v. Safeskin Corp., No. 98–CIV–2194, 1998 WL 832706 at *1 (S.D.N.Y. Nov. 25, 1998) (quoting MOORE, *supra*, without more); Still v. DeBuono, 927 F. Supp. 125, 130 (S.D.N.Y. 1996) (noting that realignment "derives from the Constitution's cases and controversies limitation" without more). The Northern District of Georgia provided a bit more analysis in a 2003 case:

correctly identifying the constitutional underpinnings of the doctrine of realignment typically have failed to recognize the full significance of those underpinnings. We propose a solution.

Both courts[124] and commentators[125] have found reasons to criticize *City of Indianapolis*, but our concerns come from a different perspective: *City of*

> The need for adversity between plaintiffs and defendants stems not merely from the federal diversity statute, 28 U.S.C. § 1332—or, for that matter, from any legislative enactment—but more fundamentally from U.S. Const. art. III[']s case or controversy requirement]. . . . It is for this reason that the need to assess the alignment of parties is equally strong in federal question cases like this one as it is in those premised on diversity jurisdiction.

Larios v. Perdue, 306 F. Supp. 2d 1190, 1196–97 (N.D. Ga. 2003). The District of Nevada also devoted slightly more discussion than most in a 1990 decision: "[*City of Indianapolis*'s] holding was premised on the requirement that federal courts only consider matters where there is a true case or controversy among the parties. U.S. CONST. art. III, § 2. In other words, realignment doctrine is, at its foundation, concerned with the constitutional ban on advisory opinions." Nev. Eighty-Eight, Inc. v. Title Ins. Co., 753 F. Supp. 1516, 1525 (D. Nev. 1990). Although the second edition of Moore's Federal Practice, cited in several of the cases above (as indicated parenthetically), indeed referred to the case-or-controversy requirement, the subsequent third edition does not, instead discussing realignment only in the diversity context. *Compare* 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.74[1], at 771 (2d ed. 1993), *with* 15 MOORE, *supra* note 8, §§ 102.20, 102.21[6], *and* 16 MOORE, *supra* note 8, § 107.14[2][c][vi].

[124] *See, e.g.*, Md. Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 622–23 (2d Cir. 1993) (arguing that *City of Indianapolis* did not require the principal-purpose test).

> The primary purpose approach is not actually dictated by *Indianapolis* because though the facts of that case involved only a single controversy among the litigants involving the enforceability of a 99-year lease, the Supreme Court did not intend that all cases be forced into a single-issue posture. *Indianapolis* deliberately considered additional, subordinate controversies raised by the parties opposed to realignment and found that they were in fact non-issues. Such discussion would have been wholly irrelevant were the realignment inquiry to concern only the primary purpose of the litigation.

Id. at 622–23 (citations omitted); *see also* Travelers Indem. Co. v. Metro. Life Ins. Co., 798 F. Supp. 156, 158–59 (S.D.N.Y. 1992) (contending that the distinctive context of *City of Indianapolis* led to the more ready application of the principal-purpose test).

> Justice Frankfurter unquestionably stated that the finding of collision must relate to the "primary and controlling matter in dispute." However, in that particular case, unlike some others, there was an identifiable primary and controlling matter in dispute as to which opposing parties had the same interests. Justice Frankfurter noted that the interests of two parties (although they were pleaded on adverse sides) turned identically on the validity or invalidity of a lease. . . .

Indianapolis fails even to mention, much less to integrate, the constitutional case-or-controversy requirement upon which the doctrine of realignment is based. The melding of the Court's realignment analysis with diversity jurisdiction in *City of Indianapolis* created an analytically unsound foundation for applying the doctrine.

Federal courts, when facing motions to realign the parties, should focus on the constitutional case-or-controversy requirement as the foundation of the doctrine of realignment.[126] In evaluating the propriety of realignment, federal courts should apply a standard that is well established, commonly used, and specific to determining whether the case-or-controversy requirement is satisfied: specifically, federal courts should apply the standard used to ensure that the parties are not seeking an advisory opinion, as is most commonly seen in the context of declaratory judgment actions.

> Although Justice Frankfurter seems to assert that the adversity must relate to the primary issue in dispute, he, nonetheless, in footnote 3, explored whether there were other matters in controversy between the two questioned parties that would justify regarding them as adversaries. He found that there were not.

Id. at 158.

[125] *See, e.g.*, Braverman, *supra* note 8, at 1096 (arguing that one of the reasons for the confusion resulting from *City of Indianapolis* was that "Justice Frankfurter's deep hostility toward diversity jurisdiction led him to questionable interpretations of Supreme Court precedents and to a rule that enabled the Court to dismiss a case that properly belonged in federal court"); *id.* at 1119 (proposing that courts approach realignment by "(1) align[ing] the parties with respect to the primary purpose of the suit, and (2) investigat[ing] any other conflicts that might justify aligning the parties differently"); Everette, *supra* note 8, at 1994, 1996 (noting that the narrower principal purpose approach reflected "the fact that Justice Frankfurter, the author of the majority opinion in *Indianapolis*, opposed diversity jurisdiction throughout his tenure and attempted to place limits upon it" and urging the alternative of "identifying the primary dispute and then considering whether any other controversies warrant aligning the parties differently"); Sherkow, *supra* note 8, at 529 (noting "the history behind diversity jurisdiction that colored the majority opinion in *Indianapolis*" and criticizing "both the principal purpose test and the substantial controversy test as procedurally defective and unsound as a matter of policy").

[126] Two federal district court decisions offer a good starting point for such a case-or-controversy discussion. In the first, the court rejected the defendant's attempt to assert a third-party impleader claim for lack of derivative liability, and then rejected the defendant's urging that the court simply realign the parties, stating that, with respect to the request for realignment, "[the defendant's] request falls outside the scope of the realignment doctrine's purpose, which is to prevent unconstitutional advisory opinions by ensuring that a true case or controversy exists between the parties." *Portfolio Recovery Assocs.*, 2011 WL 5526043, at *3. In the second, the court notes that realignment is "premised on the requirement that federal courts only consider matters where there is a true case or controversy among the parties. U.S. CONST. art. III, § 2. In other words, realignment doctrine is, at its foundation, concerned with the constitutional ban on advisory opinions." *Nev. Eighty-Eight*, 753 F. Supp. at 1525.

Before the passage of the federal Declaratory Judgment Act in 1934,[127] the Supreme Court had expressed concern about the ability of the federal courts to entertain declaratory judgment actions.[128] The Court's concern lay in the potential that a declaratory judgment action might not present the requisite adversary context and therefore constitute an advisory opinion, which would not comport with the Constitution's case-or-controversy requirement.[129] In 1933, the Court backed away from an absolute prohibition against hearing declaratory judgment actions, stating that such actions would be justiciable "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy."[130]

The next year, Congress passed the federal Declaratory Judgment Act,[131] addressing the Court's justiciability concern by inserting the phrase "[i]n a case of actual controversy" at the outset of the declaratory judgment statute, intending thereby "to ensure that the declaratory judgment action be confined to cases within the constitutional boundaries of the case-and-controversy clause."[132] The Supreme Court upheld the Act's constitutionality in 1937.[133] Thus, in the context of declaratory judgment actions, the federal courts have long been required to evaluate whether an "actual controversy" has been presented, due to the presence of that language in the federal Declaratory Judgment Act.[134]

An identical concern underlies both the doctrine of realignment and declaratory judgment actions—that of ensuring the requisite adversity necessitated by the constitutional case-or-controversy requirement. In ensuring that a case is justiciable and not an advisory opinion, there must be an actual dispute between adverse litigants.[135] Thus, in the context of declaratory judgment actions, the Supreme Court has repeatedly and consistently held that the case-or-controversy

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[127] 28 U.S.C. § 2201 (2006).

[128] *See* Piedmont & N. Ry. v. United States, 280 U.S. 469, 477 (1930); Willing v. Chi. Auditorium Ass'n, 277 U.S. 274, 289 (1928).

[129] *See, e.g.*, Alabama v. Arizona, 291 U.S. 286, 291 (1934) ("This Court may not be called on to give advisory opinions or to pronounce declaratory judgments."); *Willing*, 277 U.S. at 289 (holding that a declaratory judgment action should have been dismissed because it did not present "a case or controversy within the meaning of Article III").

[130] Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 264 (1933).

[131] *See* 28 U.S.C. § 2201(a).

[132] Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 549 (1989); *see also* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) ("[T]he phrase 'case of actual controversy' in the [Declaratory Judgment] Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III.").

[133] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

[134] 28 U.S.C. § 2201(a) (authorizing actions for declaratory relief in the federal courts "[i]n a case of actual controversy").

[135] *See generally* CHEMERINSKY, *supra* note 103, § 2.2 (discussing the need for a controversy between adverse parties).

requirement is satisfied when there is "a substantial controversy, between parties having adverse legal interests."[136]

Indeed, in 2007, the Supreme Court specifically addressed the appropriate standard for reviewing declaratory judgment actions for compliance with the constitutional case-or-controversy requirement.[137] The Court declined to establish a bright-line rule, instead instructing the federal courts to look at all the circumstances:

> *Aetna* [*Life Insurance Co. v. Haworth*] and the cases following it do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not. Our decisions have required that the dispute be "definite and concrete, touching the legal relations of parties having adverse legal interests"; and that it be "real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." In *Maryland Casualty Co v. Pacific Coal & Oil Co.*, we summarized as follows: "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[138]

In the realignment context, the application of this standard would require the federal court to examine whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests. Under this approach, courts would address any concerns specific to a

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[136] *MedImmune*, 549 U.S. at 127 (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)).

[137] *MedImmune*, 549 U.S. at 126–28.

[138] *Id.* at 127 (citations omitted) (quoting *Md. Cas.*, 312 U.S. at 273; *Aetna Life Ins.*, 300 U.S. at 240–41).

> For there to be an "actual controversy" cognizable under the Declaratory Judgment Act and Article III, a dispute must be "definite and concrete, touching the legal relations of parties having adverse legal interests." The dispute must "admit[] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Kevin C. Walsh, *The Ghost that Slayed the Mandate*, 64 STAN. L. REV. 55, 67 (2012) (footnotes omitted) (quoting *Aetna Life Ins.*, 300 U.S. at 240–41); *see also* Streck, Inc. v. Research & Diagnostic Sys., Inc., 665 F.3d 1269, 1282 (Fed. Cir. 2012) ("After *MedImmune*, courts must look at 'all the circumstances' to determine whether a declaratory judgment plaintiff has shown a case or controversy between the parties.").

diversity-jurisdiction context, such as improper, collusive, or fraudulent joinder, by resorting to existing statutory or judicially created remedies.[139]

This approach to the doctrine of realignment is analytically sound and easier for the federal courts to apply. The approach is analytically sound because it rests firmly upon the case-or-controversy foundation, drawing no artificial distinction between federal cases being heard on the basis of diversity jurisdiction and those based on arising-under jurisdiction. Indeed, in light of available alternatives for improper or collusive joinder, the principal-purpose test merely burdens the federal courts, not only by potentially requiring them to delve into the action's underlying merits, but also by potentially requiring them to engage in conjecture. Moreover, this approach is easier for federal courts to apply because there are far more applicable precedents due to the numerous federal cases employing this approach in the declaratory-judgment context.

CONCLUSION

For more than seventy years, the federal circuit courts have struggled with the applicable standard for determining the propriety of realignment as required by the Supreme Court's *City of Indianapolis* decision. Presenting a classic example of an inability to see the forest for the trees, this struggle resulted from the Supreme Court's undue focus on the diversity-jurisdiction context of the realignment issue in *City of Indianapolis* rather than on realignment's purpose. Certainly the doctrine of realignment is significant in diversity cases due to its potential for divesting the federal court of subject-matter jurisdiction, but realignment is not restricted to diversity cases. By erroneously fixating on the diversity context, the Court unwittingly overlooked the reality that realignment ultimately is a procedure aimed more generally at securing the adversarial context mandated by the constitutional case-or-controversy requirement. Accordingly, the appropriate approach to determining whether realignment is warranted lies in the standard used in declaratory judgment actions: the case-or-controversy requirement is satisfied when the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests.

[139] *See* Sherkow, *supra* note 8, at 553–59 (discussing Section 1359 and fraudulent joinder); *supra* note 17–19 and accompanying text (same).